



February 3, 2006

NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington, DC 20515

nepataskforce@mail.house.gov

RE: NEPA Draft Report – Initial Findings and Draft Recommendations

To Whom It May Concern:

Please accept the following comments on the above draft report on behalf of the members of the American Forest Resource Council (AFRC). AFRC represents over 80 forest product businesses and forest landowners in twelve western states. Our mission is to create a favorable operating environment for the forest products industry, ensure a reliable timber supply from public and private lands, and promote sustainable management of forests by improving federal laws, regulations, policies and decisions that determine or influence the management of all lands.

AFRC feels strongly that the existing regulations and implementation guidance for the National Environmental Policy Act (NEPA) are clearly hindering the implementation of professionally sound, scientifically based policy and project level decisions. Many of these decisions directly affect the quality of environments where our members operate their business and raise their families.

We support the Committee's effort to take a comprehensive look at ways to modernize and improve this decades old environmental law. To assist in the effort, we offer the following comments and suggestions to your draft report.

Recommendation 1.1

We support this recommendation and believe that this is one of the most important recommendations by the task force. As currently implemented, federal agencies with high political controversy treat almost all actions as "major federal actions." We strongly discourage the use of vague terms to define "major federal action" in the statute which would invite further litigation to clarify the terms such as the word "substantial." There should be some concrete way to determine what is and what is not a "major federal action." We are particularly concerned with an expansive definition of major federal action that includes ongoing projects where requiring a halt to projects for further NEPA analysis is extremely costly and disruptive. We

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would prefer to have “major federal action” limited to new projects. If ongoing projects are included, then concrete limits should be placed on the obligation to perform NEPA analysis for those projects. For example, the Supreme Court in Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 124 S. Ct. 2373, 2385 (2004) held that for a land use plan, the major federal action is completed upon approval of the plan and there is no ongoing “major federal action” that requires further NEPA supplementation. Of course, any effort to clarify “major federal action” must also address “significantly affected the quality of the human environment.”

Recommendation 1.2

While we support this recommendation in concept, we are concerned that specific timelines for completion of NEPA documents may not always prove useful in expediting the process, and could focus agency efforts on meeting timeframes rather than adequately meeting procedural and substantive requirements of the various legislation and regulation.

Recommendation 1.3

We support this recommendation, particularly statutory recognition of the categorical exclusion. We would look to the amendment to specifically address the different purposes of the three levels of analysis and documentation and are concerned that environmental assessments (EAs) already approach the scope of environmental impact statements. We recommend that any amendment specifically limit the scope of an EA.

Recommendation 1.4

We have significant reservations about simply adding the CEQ regulation on supplementation of NEPA documents into the statute. In this modern day, with agencies being bombarded by new information weekly, there must be explicit limits on when supplemental environmental analysis is required or in the words of the Supreme Court it will “render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.” Marsh v. Oregon Natural Resource Council, 490 U.S. 360, 392 (1989). The CEQ regulation has poorly defined limits on supplemental analysis and it should not be added to the statute in its present form.

Recommendation 2.1

While we support this recommendation in concept, we believe that the regulations should be amended to give weight to substantive comments, and like the Task Force, discourage mass mailing and campaign responses to NEPA documents and federal proposals for action. It would also be helpful for Congress to emphasize that the purpose of NEPA is to inform agency decision-makers, and the public, of the environmental consequences of their proposed actions. While the public may comment on a draft EIS, this process is not a referendum on the proposed action but rather is a process to obtain additional information on the environmental consequences. Obviously, the public at large must be allowed to comment on the proposed agency action, but this should occur under the agency decisionmaking process. The public should be educated that comments on a draft environmental analysis should address the content and methodology of the analysis, not the merits of the proposed agency action.

Recommendation 3.2

We strongly support this recommendation. Duplication of analysis and coordination requirements is a waste of time and scarce public financial resources, and this recommendation would help eliminate that duplication. The statute should explicitly provide that a biological opinion prepared pursuant to Section 7 of the Endangered Species Act is the functional equivalent of NEPA requirements.

Recommendation 4.1

We support these proposals for clarifying judicial review. We recommend that in addition, such a provision make clear that having an economic interest in the proposed action does not disqualify an entity from standing to challenge the quality of the NEPA analysis or from intervening to defend the analysis. Provide that a perspective bidder or leasee on a proposed project or the contract holder or holder of a lease for the project have a right to intervene in any NEPA action challenging the project. Place the burden of proof on plaintiff to show by clear and convincing evidence that the Forest Service decision was not based on the best available science and that the missing information was actually essential to a reasoned choice among alternatives. We understand that your statistics suggest that only a small portion of NEPA analyses are challenged in federal court. However, judicial interpretations of NEPA have far greater impact than just the case at hand. NEPA cases truly epitomize the axiom of “bad facts make bad law.” One NEPA decision binds federal agencies throughout an entire federal appeals circuit and influences judicial and agency decisions throughout the country. An example is the *Lands Council* decision described in our comments on Recommendation 8.1 below. For the Forest Service, violations of NEPA are by far the most common claims in litigation. During the past 13 years, over 400 lawsuits have been filed with NEPA claims, resulting in often ambiguous, conflicting and transient standards with which the agency must attempt to comply.

Recommendation 4.2

We support the need for timely dissemination of court decisions and their applicability to federal planning and documentation. However, we do not support this recommendation. We believe that a CEQ “clearing house” could cause additional administrative procedures and become an obstacle for agencies to consider and approve federal projects. As an alternative, we recommend that CEQ be directed to conduct a rulemaking every three years to address NEPA interpretations by the federal courts of appeals.

Recommendation 5.2

We support the specific recommendation and believe it is a concept that Congress should clarify or else the courts will. While CEQ regulations directing analysis of impacts resulting from inaction would be helpful, statutory language would establish the concept once and for all. We are concerned however with the statement in the explanation of the recommendation which states: “An agency would be *required* to reject this alternative if on balance the impacts of not undertaking a project or decision would outweigh the impacts of executing the project or decision.” (Emphasis added.) While we fully support this statement in principle, we oppose inclusion of such a directive in NEPA. As the Supreme Court recognized, NEPA is strictly a procedural statute ensuring that federal agencies on the environmental effects of a proposed action so that the agency may make an informed decision; the law does not mandate any “particular substantive environmental results.” *Marsh v. Oregon Natural Resources Council*,

490 U.S. 360, 371 (1989); accord *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). We prefer to keep NEPA procedural and thus recommend that the Task Force describe this recommendation “making it likely an agency would reject this alternative” or “an agency would be justified in rejecting this alternative.” In this manner, Congress recognizes the agency’s authority in a manner that, as the Supreme Court described in *Methow Valley*, “inevitably brings pressure to bear on agencies.” *Robertson v. Methow Valley Citizens Council* at 349.

Recommendation 5.3

We think that this recommendation, as stated, is unclear. We question whether CEQ has the authority to require an agency to implement mitigation on its own actions, let alone impose mitigation on a license or permit issued to a private applicant. Mitigation should certainly be considered by agencies, but should only be mandatory at the agency’s discretion. Agencies often rely on mitigation to conclude that a project may not significantly affect the quality of the human environment. The NEPA statute should be amended to provide that if an environmental assessment decision notice contains a commitment that mitigation measures will be included in a contract, license, or permit, then the person may not challenge the project on the grounds that its environmental effects will be significant and require an EIS.

Recommendation 6.1

We strongly support agency consultation with stakeholders. However, we believe that NEPA is first and foremost a public disclosure law as opposed to a public participation law. Many other laws require various forms of public participation in agency planning and decision-making and NEPA should not be duplicative of these laws or impose additional requirements on agencies.

Recommendation 7.1

We do not support this recommendation. EPA already reviews agency EISs. Although the EPA review is supposedly limited to assessing the adequacy of the analysis, all too often EPA seeks to influence the substance of the ultimate agency decision as well. A CEQ role would add confusion and create additional layers of review and bureaucracy, and may well result yet more pressure on the agency to make a particular decision.

Recommendation 8.1

The treatment of the effects of past actions is a prime example of the confusion created by a single judicial decision, no matter how many lawsuits are filed. The Forest Service has generally treated the effects of past actions as part of the existing conditions analysis, i.e., analyzing conditions as they are now clearly covers the effects of past actions in the area. In *The Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005), the U.S. Court of Appeals for the Ninth Circuit invalidated this approach and ruled that past actions must be included in the cumulative impact analysis. This recommendation would return analysis of past actions to the proper place in the EIS. We recommend that the Task Force restate the recommendation to avoid any confusion of your intent: “Recommendation 8.1: Amend NEPA to clarify that agencies evaluate the effect of past actions in the assessment of existing environmental conditions.” This would avoid any perception that agencies should employ the same methodology for analysis of cumulative impacts and assessment of existing environmental conditions.

Recommendation 8.2

We strongly support any steps by Congress to either address the treatment of cumulative impacts in statutory language or in directives to CEQ for rulemaking. This issue, the scope of cumulative impact analysis, is one where the federal courts have been particularly active. Since the courts are not bound by any requirement for consistency, federal agencies, particularly, but not limited to, the U.S. Forest Service, are faced with ever-expanding directives for conducting these analyses. Without cogent rules explaining geographic and temporal scope of the analysis, courts are free to demand whatever scope the particular judge feels comfortable with.

Recommendations 9.1, 9.2, 9.3

We support these recommendations. These studies are very much needed and the information should not only be available to Congress, but to the public as well.

Finally, Congress should relocate the language regarding major federal actions significantly affecting the quality of the human environment from Sec. 102(2)(C) to the beginning of Sec. 102(2). Thus, 102(2) would be revised to read “(2) all agencies of the federal government shall for every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment -” The language from 102(2)(C) would then read “prepare a detailed statement by the responsible official on -.”

We thank you for the opportunity to comment on this important report. We look forward to working with both Congress and the Administration on modernizing and improving NEPA for the many challenges to be faced in the 21st Century.

Sincerely,

A handwritten signature in purple ink, reading "Tom Partin". The signature is stylized with a large, looped "T" and a cursive "Partin".

Tom Partin
President